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No. 96-1681

In The

Supreme Court of the United States

October Term, 1996

ALLEN MORGAN, Superintendent.
Knox County Schools,

Petitioner,

vs.

CHRIS L., a minor,
by next friend, MIKE L.,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF ON BEHALF OF GEORGIA SCHOOL BOARDS ASSOCIATION, INC., AMICUS CURIAE, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF GEORGIA SCHOOL BOARDS ASSOCIATION (GSBA) IN SUPPORT OF THE PETITION FOR CERTIORARI

Georgia School Boards Association, Inc. (GSBA), respectfully moves for leave to file brief amicus curiae attached hereto in support of Petitioner for Certiorari to the United States Court of Appeals for the Sixth Circuit, and for grounds shown as follows:

1.

INTEREST OF THE AMICUS CURIAE

Georgia School Boards Association, Inc. (GSBA) is a non-profit, charitable membership corporation, comprised of all the public school districts in Georgia, consisting of 159 County and 21 Independent or municipal school districts. As an organization representing all of these districts, Movant has a vital interest in the issue presented in this case. While the Eleventh Circuit Court of Appeals has not addressed this question, the decision of the Sixth Circuit is a precedent which the Eleventh Circuit would undoubtedly consider, and amicus has an interest in any precedent, whether binding or otherwise, which deals with this subject.

2.

The State of Georgia has two mandatory offense-reporting statutes which also would be impacted by a decision such as that rendered by the Sixth Circuit below. In Georgia, a decision such as that rendered by the Sixth

Circuit arguably would obligate teachers and school officials to violate State criminal laws.

3.

Respondent has declined to grant consent to the filing of any brief amicus curiae on behalf of Petitioner.

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BRIEF AMICUS CURIAE ON BEHALF OF GEORGIA SCHOOL BOARDS ASSOCIATION, INC., IN SUPPORT OF THE PETITION FOR CERTIORARI*

SUMMARY OF ARGUMENT

Because this Court has seldom, if ever, held that a federal statute precludes a state from enforcing state laws enacted in the exercise of the state's police power to protect the lives and safety of its citizens from violence, the Individuals with Disabilities in Education Act should not be interpreted, as did the Court of Appeals below, as prohibiting school officials from filing charges with juvenile officials with respect to the disruptive behavior of a disabled student without first following the change in placement procedures under the act. As further illustrative of the potential mischief of the Sixth Circuit's holding, additional questions arise as to whether the IDEA not only prohibits school officials from filing charges with juvenile officials but also from reporting such offenses pursuant to a state student offense reporting statute. Similarly, what is the duty, if any, of a school district where either a student or teacher who is assaulted by a disabled student, either files charge or reports the offense to juvenile or other law enforcement officials?

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* Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ARGUMENT

The Court of Appeals below held that the Knox County, Tennessee School District violated the IDEA when it filed a juvenile court petition against a disabled student for destruction of school property without first exhausting the procedures under IDEA for change in placement of the disabled student who had been determined to be suffering with Attention Deficit Hyperactive Disorder (ADHD). These procedures include, *inter alia*, utilization of the "Stay Put" provision, 20 USC 1415(3)(3), under which the child must remain in his current placement pending exhaustion of the procedures – proceedings which can take months and even years.

The Court of Appeals' decision is rather simplistic: Because IDEA guarantees disabled children a "Free Appropriate Education", 20 USC 1412(2)(B), and 34 CFR 300.121, and "After the process is initiated in determining a child's status as disabled, the child's educational placement *and any subsequent change in placement* are governed by the procedures of the IDEA" (Opin., pp. 6-7) disabled students are not subject to juvenile or criminal incarceration. (emphasis supplied)

This same reasoning, of course, could result in school districts being unable to suspend or expel non-disabled students for disruptive conduct, for most states, like Georgia, have a constitutional or statutory provision guaranteeing children an "adequate" or other public education. See Constitution of Georgia, Art. VIII, Sec. I, Par. I; OCGA §20-2-131 et seq. In *D.B. v. Clarke County Board of Education*, 220 Ga. App. 330, 469 S.E.2d 438 (1996), the argument was made that these provisions precluded local

school officials from permanently expelling any student for misconduct. The Georgia Court rejected this contention, declaring:

> "The protection afforded by the Georgia Constitution is clearly both broader and more specific than that provided by the federal constitution in this area. The right to a free public education is not unlimited, however, under the Georgia Constitution. Even in those states recognizing an entitlement to education, courts have declared that [t]his entitlement does not allow the child to escape the consequences of misconduct in a public school, nor does it contradict the inherent authority of a school board to maintain order and discipline in public schools." (220 Ga. App. at 331-332).

A similar scenario was presented under the IDEA to the Fourth Circuit recently. A panel court held that a Virginia policy whereby disabled students could be suspended or expelled like nondisabled students when the behavior in question was unrelated to their disabilities violated the IDEA requirement that the state provide all disabled students with a free, appropriate public education. The panel court applied the syllogism rejected in the Georgia case, held the Virginia policy to be invalid, and upheld the withholding of all federal funds to Virginia under IDEA. *Commonwealth of Virginia v. Riley*, 86 F.3d 1337 (4th Cir. 1996). An *en banc* court, however, reversed, declaring:

> "1. In order for Congress to condition a state's receipt of federal funds, Congress must do so clearly and unambiguously. See South Dakota v. Dole, 483 U.S. 203, 207, 107 S.Ct. 2783, 2796, 97 L.Ed.2d 171 (1987). Language which, at best,

only implicitly conditions the receipt of federal funding on the fulfillment of certain conditions is insufficient to impose on the state the condition sought.

2. Title 20, U.S.C. §1412(1) guarantees that all children with disabilities be provided 'the right' to a free public education; this section does not purport to require that every disabled child be provided a free public education regardless of state disciplinary policies governing the provision of educational opportunities to disabled students expelled or suspended for criminal or other serious misconduct wholly unrelated to their disabilities. Since the plain language of the IDEA does not, even implicitly, condition the receipt of IDEA funding on the continued provision of educational services to disabled students who are expelled or suspended long-term due to serious misconduct wholly unrelated to their disabilities, the United States Department of Education was without authority to condition the Commonwealth of Virginia's receipt of IDEA funding on the continued provision of free education to such students.

3. A substantial constitutional question under the Tenth Amendment would be presented were the Secretary of Education's interpretation of the IDEA upheld, as the withholding of the Commonwealth's entire IDEA funding allotment because of its refusal to provide private tutors to the 126 disabled students expelled or suspended for serious misconduct wholly unrelated to their disabilities resembles impermissible coercion, if not forbidden regulation in the guise of Spending Clause condition." *Commonwealth of Virginia*

Department of Education v. Riley, 106 F.3d 559, 561 (4th Cir. 1997).

The *Riley* case makes a cogent statement which sometimes is disregarded with respect to the interpretation of statutes in the nature of an anti-discrimination measure. The trend is for courts to give these statutes an absolutist, unlimited application, and that produces illogical situations like that of the panel court in *Riley*, and the Court of Appeals below.

SCOPE OF THE COURT OF APPEALS DECISION – PROSECUTION OR SIMPLE REPORTING?

The facts in *Morgan v. Chris L.* indicate that the school district there actually filed charges against the student with the juvenile court. An important question is, however, whether or not that is as far as the decision goes? These scenarios fairly are presented:

(1) The school district doesn't prosecute, but merely reports the acts to law enforcement officers as required by State law;

(2) The teacher which the student assaulted files charges on his or her own in a warrant or juvenile court petition;

(3) The parents of a student who was the victim of the disabled child's assault files charges with law enforcement authorities.

In either of these situations, does the school district have any responsibility to try to get the victim – whether teacher or student – to dismiss the charges? And, are the

school district officials obligated to violate state law at the risk of criminal prosecution, by failing to report?

Many states now have mandatory child abuse reporting statutes. Georgia has two. The general child abuse reporting statute is OCGA §19-7-5 (Supp.). This section specifically identifies teachers, school administrators and counselors as being persons who must report, on pain of being guilty of a misdemeanor, OCGA §19-7-5(c); par. (h), but its applicability to student-on-student child abuse is limited by a provision which says that child abuse does not cover acts except those committed by a parent or caretaker, OCGA §19-7-5(b)(3), and another provision defines "sexual abuse" as excluding acts committed between minors or between a minor and an adult who is not more than five (5) years older than the minor. OCGA §19-7-5(b)(3.1).

The other reporting statute, however, applies *only* to public school students who commit any one of a long list of offenses.[1] Under a decision like that in *Morgan v. Chris*

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[1] OCGA §20-2-1184 declares:

"(a) Any teacher or other person employed at any public or private elementary or secondary school or any dean or public safety officer employed by a college or university who has reasonable cause to believe that a student at that school has committed any act upon school property or at any school function, which act is prohibited by any of the following:

(1) Code Section 16-5-21, relating to aggravated assault if a firearm is involved;

(2) Code Section 16-5-24, relating to aggravated battery;

L., would school officials be required to violate the student offense reporting law? Reporting sometimes results in law enforcement officers bringing charges, especially on gun-type charges. In this respect, federal law also

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> (3) Chapter 6 of Title 16, relating to sexual offenses;
>
> (4) Code Section 16-11-127, relating to carrying deadly weapons at public gatherings;
>
> (5) Code Section 16-11-127.1, relating to carrying weapons at school functions or on school property or within school safety zones;
>
> (6) Code Section 16-11-132, relating to the illegal possession of a pistol or revolver by a person under 18 years of age; or
>
> (7) Code Section 16-13-30, relating to possession and other activities regarding marijuana and controlled substances,

shall immediately report the act and the name of the student to the principal or president of that school or the principal's or president's designee.

(b) The principal or designee who receives a report made pursuant to subsection (a) of this Code section who has reasonable cause to believe that the report is valid shall make an oral report thereof immediately by telephone or otherwise to the appropriate school system superintendent and to the appropriate police authority and district attorney.

(c) Any person participating in the making of a report or causing a report to be made as authorized or required pursuant to this Code section or participating in any judicial proceeding or any other proceeding resulting therefrom shall in so doing be immune from any civil or criminal liability that might otherwise be incurred or imposed, providing such participation pursuant to this Code section is made in good faith.

(d) Any person required to make a report pursuant to this Code section who knowingly and willfully fails to do so shall be guilty of a misdemeanor."

contains a mandatory reporting act, for §14602 of the Improving America's Schools Act, P.L. 103-38, 108 Stat. 3908 declares:

> "(a) IN GENERAL. – No funds shall be made available under this Act to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency.
>
> "(b) DEFINITIONS. – For the purpose of this section, the terms 'firearm' and 'school' have the same meaning given to such terms by section 921(a) of title 18, United States Code." (20 USC 8922).

If the rationale of the Sixth Circuit prohibits a school district from complying with state student offense reporting laws, or if a victim of an assault by a handicapped child is prohibited from prosecuting the offense, the IDEA is being elevated above the safety and lives of innocent students and teachers.

NO PRE-EMPTION IN ABSENCE OF CLEAR CONGRESSIONAL INTENT

It is uncontested that whether the " . . . statute is invalid under the Supremacy Clause depends upon the intent of Congress." *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 55 L.Ed.2d 443, 98 S.Ct. 1185 (1978).

In congressional pre-emption cases governing the right of unions to picket and demonstrate under the

National Labor Relations Act, it is established by decisions of this Court that there is one area that demands equal or higher protection: the police power of the state to protect the safety and security of its citizens and property. " . . . [T]his Court has long insisted that an intention of Congress to exclude states from exerting their police power must be clearly manifested * * * We will not lightly infer that Congress by the mere passage of a federal act has impaired the traditional sovereignty of the several states in that regard. * * * But, as we have said the federal Act does not govern employee or union activity of the type here enjoined. And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act." *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749-750, 86 L.Ed. 1154, 62 S.Ct. 820 (1942).

Under the Freedom of Speech protected by the First Amendment, where the right of picketing rises to its highest level and is deemed to be a right so essential "to the maintenance of democratic institutions", *Thornhill v. Alabama*, 310 U.S. 88, 96, 84 L.Ed. 1093, 60 S.Ct. 736 (1946), even the Fourteenth Amendment bows to the State's police power where picketing otherwise peaceful is seen to be enmeshed or "entangled with acts of violence. * * * The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts." *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, 294-295, 85 L.Ed. 836, 61 S.Ct. 552 (1941). "[T]he "police power" of a

State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States and should be respected unless there is a clear collision with a national law which has the right of way under the Supremacy Clause of Article 6." *Kesler v. Department of Safety, Financial Reporting Division*, 369 U.S. 153, 172, 7 L.Ed.2d 641, 82 S.Ct. 807 (1962).

In the calculus of values inherent in the public schools, there can be no higher priority than that which should be accorded to the personal safety and protection of innocent students and teachers, and this Court should not sanction a Court decision which seems to give violent, disruptive, disabled children a license to pillage, maim and even kill, free from the traditional criminal processes relied upon to protect human life and property.

Certiorari should be granted.

Respectfully submitted,

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